SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 426

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N. V. KLM ROYAL DUTCH AIRLINES HOLLAND and SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE, *Petitioners*,

against

GERTRUDE OWEN TULLER, individually and as Executrix under the Will of William Gordon Tuller, deceased, KATHERYN L. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, and JEAN E. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, *Respondents*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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THE DECISION OF THE COURT OF APPEALS

This is a wrongful death case which was tried by a judge and jury in the United States District Court for the District of Columbia.

The Court of Appeals below in a 21-page opinion reported at 292 F. 2d 775 carefully reviewed the record in the district court, fully examined the points on appeal urged by the Petitioners, and then unanimously affirmed the judgment for the Plaintiff-Respondent. The Court of Appeals not only found that there was no reason to disturb the verdict, but it affirmatively found that the evidence amply supported the jury's verdict, and that the ruling of the trial court in denying the Defendants-Petitioners' motion to set aside the verdict or reduce the award should not be disturbed.

Moreover, the Court of Appeals found that the evidence amply supported four different categories of wilful misconduct and that no errors were committed during the trial. It must be said that the number of categories of wilful misconduct is more a matter of classification than of limitation of the number of acts of wilful misconduct actually committed.

It should be noted that neither in the Court of Appeals, nor in its petition here do the Petitioners seriously dispute the facts upon which respondent rested its claim of the various acts of wilful misconduct. Rather in the Court below the Petitioners claimed that from the acts or omissions to act and from the surrounding circumstances, the jury should not have drawn the inferences from which it found wilful misconduct. Similarly, the Petitioners in effect claim here that the Court of Appeals should not have drawn the same inferences. In the first instance, the Petitioners would disregard the basic function of a jury. In the second, the Petitioners would disregard the review functions of the Court of Appeals.

It is clear that the conditions that would require the extraordinary intervention of this Court do not exist here. In an attempt to accomplish this, the Petitioners have created issues that are demonstrably spurious. It is respectfully submitted that the so-called "Questions Presented" are contrived and rest in the main upon plucking out of context of a word in the opinion, and attempting to impute a result directly contrary to the plain holding and intent of the Court below. Upon such frail foundation is Petitioners' house erected.

RESPONDENT'S STATEMENT OF THE CASE*

At 2:38 a.m. Greenwich Mean Time on September 5, 1954 in clear, calm weather KLM Flight 633 (PKY) took off from Shannon Airport using runway 14 (JA 33a). The flight had originated in Amsterdam, destination New York. The plane was a Lockheed Super constellation carrying a flight crew, stationed in the forward cockpit area, of 7 men, consisting of 4 licensed pilots, 2 flight engineers and a radio operator (JA 33a). The aircraft was equipped with two-way radio in triplicate for individual use of Captain Viruly, Co-pilot Parfitt and Flight Radio Officer Oudshoorn (JA 230a, 278a). This radio equipment was powered from the batteries and would continue to operate even if, due to an emergency, it should become necessary to throw the main switch (JA 337a). In addition, the aircraft carried a portable emergency radio which, upon turning an attached crank, would generate its own power and automatically transmit distress signals to a range considerably more than that involved in

* This statement of facts is in accord with those found by the Court of Appeals.

this case (JA 276a). The aircraft carried 3 self-inflating rubber lifeboats or dinghies (with a capacity of 20 persons each) 2 in one wing and 1 in the other (JA 57a). Available in the cockpit were full face gas or smoke masks for use by the crew, (JA 57a), a number of flashlights and in the same area, lengths of extra rope for emergency use (JA 321a). In the cockpit were also oxygen equipment, including a set of portable oxygen bottles (JA 52a). The aircraft had exit doors which could be opened from the inside or from the outside (JA 72a).

The deceased, Dr. Tuller, was a fare-paying passenger, having boarded the plane at Amsterdam (JA 32a). The crew had failed to advise him or the other passengers of the location of life jackets and to instruct in their use (JA 120a, 132a). 32 to 42 seconds after the aircraft became airborne it made an involuntary landing on the Estuary of the River Shannon (JA 33a), coming to rest on the mud and in a few feet of water. Impact with the water was relatively mild and the plane did not sink. The aircraft did not break apart (JA 123a). There was no fire or explosion at any time. The crew immediately donned life jackets and never advised the passengers to do so.

Neither Dr. Tuller nor any member of the Flight Crew was hurt (JA 243a, 247a, 300a, 301a, 333a, 447a, 454a). The radio operator had deliberately failed to fasten his seat belt as required by regulations and was thrown from his seat and away from his duty post while the plane was still in the air. (JA 237a, 292a, 293a).

No distress message was sent either by the radio operator, the pilot or the co-pilot, over either the regular system or the emergency radio (JA 298a, 239a).

The point where the plane rested was a little over one mile from the airport on a direct track from or extension of runway 14 and well within the interior of Ireland (JA 138a).

Dr. Tuller was seated in the rear of the plane. He escaped through a rear window, dropped into the water and climbed on the tail of the plane together with a fellow passenger Ellis (JA 111a). Although the crew was aware of these passengers on the tail, they made their way to shore in the aircraft dinghies (JA 258a, 305a). Tuller and Ellis were left standing on the tail in tidal water for over 4 hours (JA 116a). Finally, when the tide had risen about chest high Tuller lost his hold, slipped off the tail, and immediately disappeared beneath the surface. (JA 116a). His body was recovered several days later (JA 34a). The Petitioners admitted that the crash caused his death. (JA 357a).

Although the aircraft was owned and operated by KLM, SABENA had undertaken by contract to conduct flight watching and dispatching of KLM aircraft at Shannon Airport. SABENA's duties included preparation of the flight plan, which provided for periodic position check points on the aircraft track beginning at take off, then at the Kilkee marker (9 minutes away) and continuing at approximately 40 to 60 minute intervals thereafter; (Ex. 13) keeping track of the movement and whereabouts of the aircraft; advising KLM's local Operational Representative, Irish Airlines, "as soon as possible" of any "probable" or known interruptions; maintaining contact with the flight and in the event of an emergency, "taking action necessary for the safety of the flight." (JA 441a-442a).

To assist in this work SABENA had in its office a radio for monitoring messages between KLM's aircraft and the tower (JA 34a-Item 31). It was the established custom and practice that a radio communication or message was not considered complete until the same was specifically acknowledged by the recipient. (JA 161a, 103a, 188a).

As PKY became airborne, the tower transmitted to the aircraft its take-off time of 2:38. However, since this transmission was never acknowledged, the message was incomplete. The SABENA monitor was shut down immediately upon the transmission of the take-off time from the tower to the aircraft and before the message was completed (JA 188a, 34a). By switching off the radio before the message was completed, SABENA placed itself in a position where it could not become aware of such probable flight interruption. The time-off call from the tower is normally acknowledged by the aircraft and such acknowledgment is required to complete the message (JA 231a, 232a, 75a). The reason for this practice in radio communication is obvious. SABENA deliberately shut off its monitor at the critical take-off phase. There was no message or other transmission monitored or received by SABENA in spite of the position check points on the flight plan above noted.

SABENA's chief Dispatcher, Cousins, left his office shortly after the take-off and did not return until 3:45. While he was away his office was advised that PKY had not made contact since its takeoff (JA 35a, 161a). KLM's Flight Operational Representative at Shannon was not advised of the flight interruption or probable flight interruption until 4:40 o'clock—2 hours after

the accident (JA 511a, 521a). At about 5:00 a.m. a rescue launch put out from Foynes a few miles away (JA 521a, 556a). Just as it arrived in the vicinity of the aircraft Dr. Tuller slipped off the tail (JA 116a) and immediately disappeared from sight.

Dr. Tuller was 35 years of age at the time of his death. He was in good health and had a stipulated life expectancy of 36½ years. He was survived by his wife aged 33 and 2 children aged 4 and 8 respectively. He had graduated from Massachusetts Institute of Technology, specializing in electronics, from which institution he later received M.S. and Ph.D. degrees. At the time of his death he was Vice President in charge of Engineering of Melpar, a division of Westinghouse Airbrake and during the last year of his life had a salary of approximately $27,000.00 per annum. He had been with Melpar practically from the time of his graduation. The evidence shows that Dr. Tuller had already achieved a place of eminence in his profession at this early age (JA 183a-203a; 364a-373a) and had a reasonable expectancy of a substantial increase in his future earnings.

SUMMARY OF ARGUMENT

The Court of Appeals was not asked to and did not decide a question involving the Construction of the Warsaw Convention, nor did it equate negligence with wilful misconduct.

The District Court did not depart from the accepted and usual course of judicial proceedings.

REASONS FOR DENYING THE APPLICATION

I.

THE COURT OF APPEALS WAS NOT ASKED TO AND DID NOT DECIDE A QUESTION INVOLVING THE CONSTRUCTION OF THE WARSAW CONVENTION

The Trial Court in its charge defined wilful misconduct as follows: (JA 640a)

> "Willful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means the intentional omission of some act with knowledge that such omission or failure to act will probably result in damage or in injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission."

The jury was instructed that in order that the verdict exceed $8,300.00 the jury must find that the defendants had been guilty of such wilful misconduct. No exception was taken to this charge and indeed none could properly have been taken.

Neither party here contends that the law as applied in the charge was error. This Court can do no more than accept for the purposes of this case what both parties agree to be the accepted interpretation of the Convention.

The Court of Appeals agreed (Pet. App. p. 43) that "there was sufficient evidence from which a jury could reasonably find that" each defendant "was guilty of

wilful misconduct, as that term has been interpreted . . ."

II.

THE COURT OF APPEALS DID NOT EQUATE NEGLIGENCE WITH WILFUL MISCONDUCT

After having determined that wilful misconduct was present, the Court of Appeals then considered the question of proximate cause. It said that "as to each category of wilful misconduct the negligence in question contributed proximately to Tuller's death." (Pet. App. 43). This statement did not indicate any intention to equate "negligence" with "wilful misconduct" but merely used the term in a restricted and descriptive sense within the stated frame of reference, i.e. wilful misconduct.

The Court could just as well have said, "as to each category of wilful misconduct the act in question contributed to Tuller's death." The fact that the "act" may have been characterized as "negligence . . . in its discussion of proximate cause does not change the essential finding of "wilful misconduct", the Court having held all of the required elements to be present. Of course it may be noted that the same rule of proximate cause would apply to wilful misconduct as to negligence.

Accordingly points II and III of Petitioners' brief which are erected on the false premise of "equating" and consequent lack of uniformity, fall for this as well as for the general reasons given in this brief. It follows that Petitioners' lengthy discourse on the meaning of wilful misconduct, can best be characterized as another instance of the technique of erecting a straw man so that he can be knocked down.

III.

THE DISTRICT COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The Court of Appeals below was not asked by either party to redefine "wilful misconduct" as used in the convention. Nor did it attempt to do so. As defined in the charge to the jury it was clear and accepted by all parties. The defendant merely argued that the acts complained of by the plaintiff did not fit the definition, and the plaintiff argued that the evidence on the subject was sufficient to take the issue to the jury.

According to the definition of "wilful misconduct", as defined below and as accepted by the parties, three things must coincide (1) an act or omission, (2) done or omitted intentionally, and (3) done or omitted in a manner from which can be implied a reckless disregard of probable consequences.

The first element of wilful misconduct is susceptible of positive proof: the doing or omission of an act. But the second and third elements require a determination of the state of mind of the actor. The state of mind can only be inferred from proof of all the surrounding circumstances. A determination on these issues, like intent in a criminal case, is peculiarly within the province of the jury.

However, petitioners' theme which does not challenge the essential facts is that the jury may not draw an inference of "wilful misconduct" from the nature of the act or of the omission and from the surrounding circumstances. This argument is contrary to the organic concept of Trial by Jury. The unquestioned function of a jury is to draw inferences from facts.

It is well settled that the Jury's verdict on such an issue of fact was a final determination, not subject to review, where the evidence was of such a character "that intelligent persons may honestly differ as to what was actually proved." (*Friedman* v. *Decatur Corp.* 135 F. 2d 812, 816 (D.C. Cir.)

The character of the acts of commission or omission could best be determined by the particular circumstances under which they were committed and the background of the actor; *e.g.*, the most critical phases of air operation are take-offs and landings; during take-off the crew must be mentally prepared to anticipate a failure or an emergency and be physically kept, by means of seat belts, in a position to act; the careful training of the crew to meet emergencies during take-off; the crew's knowledge of the location, purpose of and the handling of all equipment designed for emergency use (JA 75a, 227a, 64a, 83a, 84a); none of the Flight Crew of 7 men were hurt in the crash and all escaped (JA 323a); the plane came to rest practically intact (JA 123a); the plane was not sinking (JA 247a); there was no fire or other occasion for undue haste (JA 110a, 247a); regulations and manuals relating to crew duties in emergencies. All of these considered, together with the series of specific acts and omissions leading to the death of Tuller were ample evidence from which the Jury could find that the acts or omissions were done or omitted deliberately and in a manner from which could be implied reckless disregard of the probable consequences.

There is no dispute on the first element of "Wilful misconduct," viz., the act or omission. Each incident mentioned was proven and not denied. The evidence amply supports the inferences drawn by the jury of

intention and recklessness, as will now be shown. Petitioners' real dispute is that they would not have drawn the same inferences from the facts as the jury did.

A. As to the Failure of the Radio Operator to Fasten His Seat Belt and to Send a Distress Message

As Oudshoorn testified (JA 281a, 282a):

> "Q. Did every member of the flight crew have a seat with a seat belt? A. That's right.
>
> "Q. What is the purpose of seat belts? A. Well, in case of an accident, or in sudden stop or acceleration, that you are not thrown out of your chair.
>
> "Q. And you can continue your duties? A. That's right.
>
> "Q. If you are not thrown out of your chair? A. That's right.
>
> "Q. Is there any regulation requiring that these seat belts be fastened at any particular time? A. Yes, during take off and landing they are supposed to be fastened.
>
> "Q. When you say 'during take off,' how much time does that encompass during take off? A. Well, that means from when you start off blocks until the Captain gives the command to switch off the sign 'Fasten seat belts'."

Oudshoorn, the Flight Radio Operator (JA 275a) was seated at a desk in the cockpit area during the critical take-off phase of the flight. On his desk was a radio transmitter for his use, tuned to the frequency of the Shannon tower (JA 278a, 290a). As was testified by Captain Ten Duis, Chief Pilot of Crew Training of KLM (JA 63a), it is required that there "be a conscious anticipation prior to take-off of possible failure" (JA 75a).

It would have taken Oudshoorn as long to send a distress message as it would take to say the words "King Yoke Mayday" (JA 272a, 278a, 299a). KLM's own operation manual required that a distress message be sent as soon as an emergency arose even if a crash is uncertain (JA 437a, 438a):

> "Surface stations and ships should be informed of the existence of an emergency as soon as it arises. This should be done even if it is not certain that the airplane will have to be ditched. It is easy enough to cancel the call after the emergency is over."

This emergency arose while the plane was still in the air and before it had struck the water (JA 237a, 292a, 293a). Oudshoorn was conscious of the fact that the plane was falling. He expected a crash (JA 293a). Then why didn't he send the message (JA 298a)? The reason is clear. When the plane buffeted and stalled he was thrown out of his seat and away from his desk and mike (JA 296a). This happened because he had not fastened his seat belt (JA 292a, 293a). If his belt had been fastened he would have remained seated and in a position to continue his duties. Other crew members had their belts fastened and remained seated, and had other take-off duties to perform. (JA 243a, 293a). But before Oudshoorn got back to his post the plane was in the water, and no message was sent, although the electric power remained on (1) after a series of shudders in the air, (2) while the plane was in descent, (3) after the plane had come to rest and (4) long enough for Ellis to unstrap his belt have a brief conversation with his wife, get out of his seat and go part way up the aisle (JA 110a, 111a).

This failure to send a message "as soon as" the emergency arose was directly attributable to his failure to hitch his seat belt. If the message had gone out the airplane would have been quickly located at the foot of runway 14 (it was right in the take-off track), the rescue launch would have picked up Dr. Tuller hours before he finally slipped and disappeared.

The company regulations required that seat belts be fastened so that crew members would not be thrown from their seats and could continue their duties (JA 281a). Moreover, the Irish Air Order provided (Ex. 24a, p. 27):

> "that before the commencement of a flight and before each landing of the aircraft, and in conditions of turbulent air such that the precaution is considered necessary, all safety belts and safety harnesses are correctly fastened and that passengers are made aware of the method of operation;"

Oudshoorn stated that he had no reason for not fastening his belt (JA 293a). When asked if he had any reason he answered; "No. I couldn't say yes," obviously meaning that if he answered "Yes" it would not be the truth. His failure to do so was deliberate. Certainly the jury was justified in so finding. Since the only function of a seat belt was to keep the Radio Operator in his seat, a probable consequence of a failure to fasten his belt was that he would be thrown from his seat in an emergency and away from his post of duty. And that is exactly what happened.

B. As to the Failure of Pilot or Co-Pilot to Send a Distress Message

Neither the pilot nor the co-pilot were thrown from their seats (JA 293a). Each was equipped with a

microphone connected to a radio transmitter tuned to the tower frequency (JA 356a). Notwithstanding a company regulation to send a message as soon as an emergency arose no attempt was made to do so (JA 239a). The defendants say it was useless to try after the engineer had thrown the main switch. But that simply is not so. These radios continue to operate after the switch is thrown and as long as the batteries have life (JA 337a). As a further excuse the defendants say that the batteries went dead as soon as they were flooded with salt water. But the evidence shows that the batteries could not have been immediately flooded. The batteries were located in the top of the nose wheel well (JA 338a, 459a). The nose wheel was up and the well doors closed before the plane hit water (JA 241a, 458a). Moreover, the batteries themselves have a protective covering (JA 460a, 461a). Under such conditions it was "a reckless disregard" for the pilot and co-pilot both to assume that the radio would not work. They made no attempt to send a distress message. Such a message would have led to the quick discovery of the plane lying a short distance away and on track off runway 14.

C. As to Failure to Use Emergency Radio and Portable Oxygen Equipment

The aircraft carried a portable emergency radio transmitter designed for the very situation that arose here. This transmitter was small, self-contained and generated its own power by means of an attached crank. When the crank is turned an SOS signal is automatically sent out. This instrument had a range more than adequate for the occasion (JA 276a). It appeared, however, that this emergency radio was carried aft by the main door of the passenger cabin. Dur-

ing an emergency of this type it was one of the radio officer's duties to take this transmitter with him before leaving the plane (KLM Manual; JA 49a). Had Oudshoorn performed this duty and picked up the transmitter, rescue would have been effected hours earlier and Tuller would surely have been saved.

Oudshoorn claimed that after the plane had come to rest, it was not possible for him to pick up this equipment. He said that he could not go back into the cabin because of high water level and gas fumes. But it was demonstrated conclusively that the level of the water in the fuselage could not have kept him from picking up this equipment. The water level could not have been above his knees. Ellis testified that the water level was 4 or 5 feet below the window in the rear of the cabin (JA 111a). Second Officer Webbink testified that no water came into his compartment or the cockpit (JA 492a). The tide was ebbing at the time (Ex. 23, JA 407a). Co-pilot Parfitt was quite positive that, except for the presence of gas fumes, he could have gone all the way back (JA 263a).

But the presence of gas fumes was no obstacle since the portable oxygen equipment and full face masks were available in the cockpit (JA 222a). By the use of this equipment the radio transmitter could have been picked up with relative ease (JA 223a, 283a). These crew members had been trained in the use of this equipment, which protected them from these fumes. Before each take-off the location of all emergency equipment was checked by the crew. (JA 279a). Captain Ten Duis testified that the crew was trained in the use of oxygen and the masks under conditions where there was "lack of oxygen" and "noxious fumes" (JA 66a, 67a). This portable equipment was

easily carried on the back by means of straps leaving the hands free (JA 290a).

Under these circumstances the Jury (not the Court) had the function of determining whether or not this omission was deliberate and in reckless disregard of probable consequences.

D. As to the Handling of the Life Rafts and Abandonment of Tuller on the Tail of the Plane

The emergency life rafts or dinghies were not used to rescue Tuller from the tail. The dinghies were of large size, having the capacity for 20 people. (JA 57a). The last dinghy left half empty (JA 321a). There was no fire or immediate peril. Co-pilot Parfitt testified that there was plenty of time (JA 247a). The plane was stuck in the mud in water just off the end of the runway, in conditions of changing tides. The crew also had portable flash lights. The crew had long ropes (JA 321a). The crew wore life jackets (JA 302a, 482a). Although the crew heard the shouts for help and knew that some passengers were stranded outside on the tail of the wreck, they set out for shore and left Tuller clinging to the tail in the darkness (JA 304a).

The crew was familiar with the uses and limitations of the dinghies. In fact one of the dinghies had been maneuvered from around the wing nearer to the nose exit door of the aircraft by means of a tow-line which was attached to the dinghy (JA 471a). This was a 49 foot tow line (JA 408a). It would have been a simple matter to maneuver the dinghy by means of the line—either to drift it or to lead it (JA 65a, 89a). There was plenty of emergency line immediately at hand if needed (JA 321a). The dinghy could have

also been guided the few feet by means of the lines or towed to the tail by one of the crew swimming and pulling the line. In fact this had actually been done by crewman Webbink, in earlier maneuvering of the dinghy around to the nose exit (JA 308a).

Although these dinghies were primarily flotation devices they could thus be maneuvered by means of a line. They could not be maneuvered by means of the paddles and the crew knew this when they cast the line off and set out for shore (JA 497a).

This was a reckless disregard of the probable consequences of leaving Tuller on the tail in a moving tide and in the dark.

E. As to Failure to Advise Tuller and the Passengers of Location and Manner of Use of Life Vests

The passengers were never advised of the location of the life jackets, either at Amsterdam or Shannon. They were not instructed in the manner of putting them on (JA 109a, 120a, 132a). This was stated affirmatively by Ellis, who had also boarded in Amsterdam and who was seated immediately behind Dr. Tuller (JA 109a), and not denied by any crew member. Ellis also stated that he did not know where the life jackets were kept (JA 120a, 183a).

Here was a take-off at night over a body of water lying at the immediate end of the runway. Take-offs and landings are the most critical phases of any flight. That is where trouble mainly develops, even in the absence of a regulation on the subject, common sense dictated that under such circumstances the passengers be "shown before the critical take-off" the location of life vests. Even if the rather lengthy booklet (Deft.

Ex. 1) had been in the seat pocket (and there was no positive evidence of this (JA 482a, 510a)) and had been found and read through by the passengers, this would have been of little help, if any. This exhibit stated that the vests were located in any one of three places on board (JA 479a). The instructions for their use were not easy to interpret (JA 476a-480a). The defendant offered no company regulation that required the stewards to demonstrate the use of life vests, or even to call attention to the existence of the booklet, and no such instructions were contained in the manuals marked as exhibits. Although the testimony of Ellis was positive on this subject, the appellants did not attempt to prove by any member of the crew that any instruction on the subject was given to the passengers.

Neither party requested the Court to interpret the Irish Regulation for the jury and as observed by the Court below "The applicability of the order was a fair subject of comment in argument." The Regulation provided that the passengers must be:

> "* * * shown *before take-off*, or before reaching thirty minutes flying distance *from* the nearest shore the position of life belts * * * and the method of their operation." (emphasis supplied)

Petitioners argue that compliance with the Irish Order required only that the passengers be informed of the location and use of the life jackets prior to the expiration of 30 minutes of flight over water. 30 minutes would place this plane approximately 150 miles out at sea. The appellants would distort the obvious safety purpose of the Irish Air Navigation Order, having in mind that the take-off from Shannon was im-

mediately over water and would have been far over the Atlantic Ocean in 9 minutes. The flight had originated at Amsterdam and had flown over the North Sea and the Irish Sea.

The failures in this category, as the Court below observed, were also deliberate violations of the fundamental rule for passenger safety applying to transportation on the water, or over the water, and constituted a "conscious and wilful omission to perform a positive duty and constituted reckless disregard of the consequences." The probable and obvious effect of such failure was that in case of an involuntary landing on water the passengers would be without the assistance of life vests. The probable consequence of a passenger being dumped fully clothed in the water without a life vest are, and in this case certainly were, serious. Crew members realized the need for life vests for themselves and promptly put them on (JA 482a).

The jury was thus justified in finding that there was a deliberate omission made in a manner from which can be implied a reckless disregard of probable consequences.

It is clear from the above that Petitioners' reference now for the first time to some immaterial passages in the Chicago Convention is another transparent attempt to drag in a synthetic "treaty question" and create a spurious and irrelevant issue for this Court.

As to proximate cause; the proof shows that Dr. Tuller was in good health (JA 367a); that he had not been hurt in the crash (JA 33a—Item 21); that after standing on the tail of the plane for over four hours, with water rising up to his chest, he slipped off the tail and immediately sank; and that the rescue launch

was pulling up to take him off when this happened. The fact that no instructions as to the life vests were given, and that Tuller immediately disappeared from sight under water is more than sufficient to sustain a finding that Tuller wore no life vest.

The fact that Tuller met his death as a result of the crash is admitted. The record is silent as to the immediate cause of death. A death certificate was proffered by plaintiff and objected to by defendants on the specific ground that it was not probative of cause of death. This proffer was withdrawn and no concession was made on the subject. (JA 357a). There was however, positive proof that Tuller was alive up to the very moment that he slipped into the water (Ellis JA 116a). Obviously a life jacket worn around his chest and shoulders would have kept him afloat and alive. The jury was carefully instructed on the necessity of finding a proximate cause of the death of Tuller and its conclusion that proximate cause existed was amply supported by these facts.

F. As to SABENA's Acts and Omissions as KLM's Agent

SABENA had been employed by KLM to conduct flight watching and dispatching at Shannon. Among other things flight watching consisted of (as prescribed in their Contract):

> "Maintaining contact with all flights within its area of responsibility" (JA 441a)
>
> "In the event of an emergency, take action necessary for the safety of the flight" (JA 442a)
>
> "Report complete facts of any accident" to KLM's Operations Department (JA 442a)
>
> "Ensure that probable or known interruptions to schedules for flight operational reasons * * * are

> given as soon as possible to the operation representative designated by the Carrier." (emphasis supplied) (JA 442a)

The sworn response of SABENA to Interrogatory No. 3 stated that its services included:

> "Prepare flight analysis, assist in preparing a flight plan, * * *" (JA 60a)

Its response to Interrogatory No. 4 as to its services included:

> "* * * noting advanced or retarded progress as compared with flight plan and inform the Operational Representative, designated by the Carrier."
>
> "* * * In the event of an emergency, take action necessary for the safety of the flight, being guided by the instructions in the relevant Operations Manual of the Carrier and the supplementary instructions of the Carrier." * * *
>
> "Ensure that the Operational Representative designated by the Carrier and responsible for ground handling of Carrier's aircraft is kept completely informed as to the movements of the aircraft." (JA 60a-61a)

The deposition of Cousins was to the same effect (JA 153a), and so was the deposition of Mr. Hemblenne, another SABENA employee (JA 142a). Cousins testified as follows:

> "Q. What do your watch duties include? A. We are responsible for what is called operational flight watch, and that means noting whether a flight is advanced or retarded as compared with its flight plan, and also noting the fuel remaining as reported by the aircraft; and in certain cases

sending suggested reclearances or diversion advice to the aircraft.

"Q. Are your dispatching instructions contained in any writing or manual? A. There are instructions in this Sabena manual, and also in other manuals, which we have to comply with or observe in carrying out our duties.

"Q. What other manuals are you referring to? A. The manuals of the Irish Government Services, and ICAO regulations and other company—the manuals of other companies, for whom we are acting.

"Q. Such as KLM? A. Yes." (JA 153a-154a)

As Cousins stated KLM is "running an airline, they want to know where the airplanes are," (JA 186a).

The area of SABENA's responsibility extended from the Western Coast of England to thirty degrees west. (JA 441a). The operations representative designated by KLM was the Irish Air Lines (JA 520a).

SABENA had an office at Shannon for this purpose. This office was in the same building as the tower and the office of the Irish Air Lines (JA 552a, 154a). SABENA maintained a radio in this office for monitoring messages to and from KLM's planes in flight (JA 34a, Item 31). Mr. Cousins, SABENA's Chief Dispatcher (JA 152a), was in charge in SABENA's office on this occasion (JA 35a, Item 33).

SABENA maintained a log in which it made entries noting the dispatch and movement of the aircraft for which it was responsible. (Cousins JA 157a et seq.).

Immediately after this plane took off the monitoring radio was switched off in the middle of the take-off message from the Tower, i.e. before the plane had ac-

knowledged receipt of take-off time (JA 188a, 101a, 103a) and Mr. Cousins did not hear the Tower calling the plane for an acknowledgment (JA 188a). The message from the Tower was repeated six times, one right after the other (JA 34a Item 29). The tower take-off message was never completed (JA 75a, Parfitt 281, 232). The plane did not respond (JA 34a, Item 30). This was most unusual (JA 75a, 233a) and indicated a probable flight interruption. In fact, at that very moment the plane was down in the water. By switching off the radio before the message was completed, SABENA placed itself in a position where it could not become aware of such probable flight interruption. It was testified by Captain Ten Duis (JA 75a), Co-pilot Parfitt (JA 231a-232a) and Radio Operator Oudshoorn (JA 291a) that time-off call from the tower is normally acknowledged by the aircraft and that such acknowledgment is required to complete the message. The reason for this practice in radio communication is obvious. SABENA deliberately shut off its monitor at the critical take-off phase. If SABENA had done what it was required to do, to maintain its operational flight watch, it would have known immediately that something was wrong, and if it had checked along the the track of the take-off or requested or reported the fact to the operational representative, Irish Airlines, who could easily have done this, PKY would have been immediately discovered lying just off the end of the runway. The obvious procedure in this take-off emergency would have been to follow the take-off track from runway 14 and the prescribed take-off pattern.

At 3:25, 48 minutes after take-off, SABENA's office did learn that the plane had not made contact since

take-off. The receipt of this information was entered in the SABENA log (JA 35a, 161a). This message certainly told SABENA that there had been a probable flight interruption. However, Cousins had stepped out of the office when this information came and did not return until 3:45, (JA 35a, Item 33) twenty minutes later. He went out without waiting to determine whether or not this plane which he had just dispatched had gotten off safely. At 3:25, if not before, it was his duty to advise the Irish Air Lines of such probable flight interruption.

When he returned to his office he did not look in the log and no one called his attention to the entry made at 3:25. It was not until 4:10 or 4:15 that he first learned that the plane had not made contact (JA 168a, 169a). Neither Mr. Melling, KLM's local manager, nor the Irish Air Lines was advised of this fact until 4:40, over two hours after the take-off (JA 511a, 521a).

The switching off of the radio immediately after take-off, in the middle of the take-off message, was a deliberate act. Mr. Cousins leaving his office before having been assured of a safe take-off was a deliberate act. The failure to advise Irish Air Lines of a probable flight interruption at 2:38 or at least by 3:25 were deliberate omissions. A probable consequence of these deliberate acts and omissions was that the Irish Air Lines would be delayed getting on the job in case of emergency.

The Irish Air Lines first heard of the lack of contact at 4:40—two hours after they would have heard, had SABENA been on the job (JA 521a). At 4:45 those on shore determined that the plane had crashed (JA 556a). The rescue launch was dispatched about 5:00 o'clock (JA 521a, 556a).

From this sequence of events the Jury was justified in making a determination that had SABENA performed its duty the wreck would have been discovered sooner and Dr. Tuller safely rescued.

The omissions of SABENA and its reckless disregard of the consequences are underlined when it is considered that just a few minutes out of an available two hours would have made the difference of life and death to Tuller.

G. As to the Oudshoorn Statement

Oudshoorn was the Radio Operator on this flight. He was continuously employed by KLM as Radio Operator until July 1958 (JA 274a). On the day of the crash, as such Radio Operator, he made a written statement (Ex. 19) to the Irish Authorities (JA 315a). This statement was made in compliance with the Irish order (Ex. 24A), which required prompt report of all accidents resulting in deaths or injury. The statement was made in the presence of a KLM official (JA 315a).

One of the issues in the action concerned the failure of the operator to send a distress message as soon as trouble developed. The radio operator had testified that he did not send a message, claiming there was insufficient time to do so between the first indication of trouble and the throwing of the electrical switch by the engineer (JA 298a, 301a). He was then shown the statement (JA 315a). He identified the statement and admitted that he had made it. In this statement he gave as his reason for not sending a message, not the lack of time, but the fact that he was thinking of something else, "his skin", and was not thinking of the need for sending a distress message. As the Court below said: (Pet. App. pp. 45-46)

> "The challenged statement must be viewed as an important piece of substantive evidence on the issue of wilful misconduct. As such it discloses an awareness of the existing risks and had a direct bearing on whether there was reckless disregard of the dangers to which the plane and its passengers were exposed."

The statement was relevant and competent as original evidence, not merely as a contradiction, upon four separate grounds, each independent of the other:

(1) As a Statement Naturally Made in the Course of An Agency and Adverse to Interest

Oudshoorn was KLM's radio operator. He also kept the radio log. The portion of the statement which was received and read to the jury related, pointedly, to his duties and behavior as such radio operator. He continued on as KLM's radio operator after the accident and was so employed when he made the statement. The statement made by him a short time after the incident and which concerned the performance or non-performance of his duties as radio operator was "naturally made in the course of the agency" and, therefore, admissible in an action against his principal.

See opinion of Augustus N. Hand, C. J. in *Slifka* v. *Johnson*, 161 F. 2d 467, 469 (2d Cir. Cert. denied, 332 U.S. 758; and comment thereon in 47 Columbia Law Rev. 1228. *Whitaker* v. *Keogh*, 144 Neb. 790, 14 N.W. 2nd 596; *Grayson* v. *Williams* (C.A. 10), 256 Fed. 2d 61; 4 Wigmore on Evidence, Sec. 1078 p. 121 Note 2.

(2) By Imputation

The statement tended to establish a breach of duty by Oudshoorn. The statement would, of course, be relevant as an admission in an action against Oud-

shoorn. On this issue no wrong doing was charged against KLM other than Oudshoorn's wrongful act. If Oudshoorn committed a breach of duty then KLM became liable for the ensuing damages as a matter of law. Since KLM must be liable if Oudshoorn is liable, Oudshoorn's statement is relevant and competent in this action against KLM. See *Grayson* v. *Williams*, 256 F. 2d 61 (10th Cir.).

To the same effect Morris, D. J. in *Martin* v. *Savage Truck Line*, 121 F. Supp. 417, 419 (D.D.C.). It is immaterial that Oudshoorn is not a party defendant here. The evidence which would be admissible against KLM in an action brought against both should be just as relevant and competent in an action against KLM alone. See Richardson on Evidence (8th Edition), § 314. Moreover, the Warsaw Convention expressly provides that the carrier shall be liable for damages caused by a wilful act of an employee (See Convention Article 25 (2)).

(3) As a Memo Made in Regular Course of Business

The statement is a memorandum made in the regular course of business and as such admissible under 28 U.S.C.A. Sec. 1732. KLM was in the business of operating an airline. As a part of this business it was required promptly to notify the authorities of "any accident" which resulted in deaths or injuries (Ex. 24A, p. 33). Implicit in such requirement was the duty to give the authorities all available information regarding the accident. This memorandum was made in the presence of a KLM official and in discharge of that responsibility. As such it is a memorandum made in the regular course of KLM's business. (See *Peklis* v. *TWA*, 187 F. 2d 122 (2d Cir.), cert. denied 341

U.S. 951; *Tausey* v. *TWA*, 97 F. Supp. 458 (D.D.C.), 1951 U.S. Av. 95; *Stewart* v. *Whitney* (N.Y.) 1941 U.S. Av. 24). In each of the cited cases reports or statements made by the defendants' employees regarding an accident to the defendants or to the civil authorities were received in evidence as memoranda made in the regular course of business.

(4) Res Gestae

Neither the District Court nor the Court of Appeals based the admissibility of this statement on *res gestae*. However, the respondent submits that admissibility was also justified on that ground as well.

There has been much confusion in the decided cases on the subject of what does and what does not constitute a part of the res gestae. In later years, however, courts have shown a tendency to liberalize, to apply a practical test rather than a technical one. Formerly the time of the statement with reference to the incident was regarded as all important. Now more regard is paid to the nature of the statement and the mental state of the declarant and less to the time element. Thus a statement made against the interest of the speaker has been regarded as a guaranty of spontaneity. (See *Lane* v. *Pacific Greyhound Lines*, 26 Cal. 2d 575, 160 Pac. 2d 21, *Harris* v. *Allison* (Texas Civ. App.) 11 S.W. 2d 821, rehearing denied 29 S.W. 2d 413).

Summing up the rule, the writer in 53 ALR (2nd) said at p. 1265:

> "In dealing with this time factor, the overwhelming weight of authority is to the effect that remoteness of the statement from the time of the accident will not, of itself, bar admission of the statement, if it can be shown that, despite the re-

> moteness, the statement was spontaneous, having been made without deliberation on the part of the declarant; time, it is held, is not controlling, and the statement need not be strictly contemporaneous with the accident in order to be admissible."

An Appellate Court as well as the Trial Court (JA 314a) may determine whether the circumstances under which the statement was made afforded the adequate degree of spontaneity. (See: *Jackson* v. *Goode*, 49 A. 2d 913 (D.C. Munic. Ct. App.), *Navajo etc. Co.* v. *Mahaffy*, 174 F. 2d 305, 309 (10th Cir.). The wreck was a catastrophic event: Oudshoorn had lived through it. His statement was made to the authorities a few hours after the crash. What he said put him in an unenviable light. Under such circumstances it is reasonable to suppose that when the statement was made he was still "under the influence of the act." In fact the defendants conceded as much at page 41 of their brief in the Court of Appeals; thus: "The statement * * * was no more than a mental reaction at the time it was given."

The statement, admissible for the reasons above stated, was not rendered inadmissible because it tended to contradict the testimony of the witness. A party is always at liberty to prove the true fact by other *competent* evidence even if a witness called by him has testified to the contrary. Here the statement was admissible independently of Oudshoorn's deposition. The harsh thought that a party was bound by a statement of a witness called by him, has long since been shelved.

3 Wigmore (3rd) Sec. 897 (p. 385):

> "The primitive notion that a party is morally bound by the statement of his witness, no longer

finds defenders, although its disappearance is by no means far in the past. In the early 1800s the judges were still engaged in repudiating this false notion on the basis of the rule against impeaching one's own witness.

and Sec. 903 (p. 393)

"On correct principles, then, the use of self-contradictory statements is not forbidden."

H. As to the Pages from the Manual

These pages from the manual defined the duties of the various crew members in the event of certain emergencies. The witness testified that in the event of an involuntary landing on water the crew had been instructed "to try to carry out as many of the instructions for a planned landing" as possible (JA 213a). On this basis the pages were relevant. Moreover, although the landing may not have been a "planned ditching", after the landing the crew was certainly, and in relative calm, preparing to abandon the ship. These instructions and duties related both to ditching and abandonment.

See *Stevens* v. *Boston Elevated Ry. Co.*, 184 Mass. 476, 479, 69 N.E. 338; *Cincinnati St. Ry. Co.* v. *Altemeier*, 60 Ohio St. 10, 19, 53 N.E. 300. *Lake Shore & M. S. R. Co.* v. *Ward*, 135 Ill. 511, 518, 26 N.E. 520.

I. As to Exceptions to the Charge

The District Court did not deny petitioners the right to take exceptions to the charge. The petitioners failed to quote in full the pertinent colloquy between the Court and counsel. We do so now: (JA 647a-648a)

"Mr. Madden: As the charge is in, is it necessary to review our objections or exceptions.

The Court: No.

Mr. Chapman: This willful misconduct, you said on the part of the defendants. I think it should be on the part of the defendants or any one or more of their employees.

The Court: I said they and their agents.

Mr. Chapman: I didn't catch that.

The Court: I said that, That is it.

Mr. Junkerman: Does your Honor wish us at this time to express our exceptions?

The Court: I took this charge up with both counsel, and in the circumstances, there is no exception to the charge. Now, don't tell me that there is.

Mr. Junkerman: There is an additional request to charge.

The Court: I denied that. It is on the record.

Mr. Junkerman: I didn't think it was on the record."

The Court of Appeals found that: (Appendix to Petition p. 51)

> "We are satisfied that appellants had full and uninhibited opportunity to object to the charge concerning the liability of SABENA if they desired but failed to do so. The trial of this cause was long and expensive and the contentions underscore the need for strict compliance with the rule which treats as waived that to which no timely objection is made."

Read in context with the entire charge and the record as a whole there is no error in the charge with respect to SABENA's liability.

Since Sabena was KLM's agent a finding of wilful misconduct against either would warrant a verdict against KLM.

At (JA 640a, 641a) Judge McGuire charged that if the Jury found wilful misconduct on the part of either or both defendants then the Jury must "consider whether such wilful misconduct * * * was the proximate cause of the death."

At (JA 641a) he charged that a finding of wilful misconduct on the part of either or both defendants "will be sufficient to sustain the plaintiffs' claim in that respect."

Then at (JA 641a) he charged that if the Jury should find wilful misconduct on the part of either or both defendants "then you will come to the question of damages."

At (JA 642a) he charged that if the Jury should find wilful misconduct on the part of either or both defendants then the plaintiffs "must show pecuniary or money loss to them."

At (JA 646a) he charged that if the Jury should find wilful misconduct on the part of either or both of the defendants then the plaintiffs' "recovery is governed by the law with respect to damages."

Each of these was a correct statement of law. Obviously the jury understood that wilful misconduct must relate to the defendant against whom they return a verdict. Counsel certainly so understood the charge. This was heavily underscored when, after the jury had been deliberating for many hours, they asked to be reinstructed on certain points. (JA 655a).

In response to this request on the part of the jury all counsel, including Mr. Junkerman, agreed that the Court could read to the jury a certain portion of the charge previously given. (JA 655a). The jury was

then brought in and the agreed portion of the charge was read to them, including the following: (JA 657a)

> "If, however, you should find that the plaintiffs have proven wilful misconduct on the part of the defendants, or either of them, and that such was the proximate cause of the decedent's death, then their recovery is governed by the law with respect to damages, which I have given you, and is not limited to $8,300 or any other figure."

Once again Mr. Junkerman, representing both dedefendants, made no objection nor did he request any clarifying language.

CONCLUSION

Petitioners' application is nothing more than an attempt to divert attention from the point that this case merely involves undisputed facts and the inferences that may be drawn from them by a jury. There are no issues requiring the attention of this Court herein.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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